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BNA Insights

PRODUCT SAFETY

FEDERAL LEGISLATION

The Foreign Manufacturers Legal Accountability Act, which died when the 111th Congress adjourned sine die, would have made possible litigation against foreign product manufacturers that place defective goods into the stream of commerce, says Professor Andrew F. Popper in this BNA Insight.

The author analyzes the legislation, and offers a post-mortem on the bill. He contends "politics and self-interest stood in the way" of enactment of worthy legislation that would have protected consumers while leveling the playing field for U.S. businesses subject to domestic tort law. The outlook for potential similar legislation in the 112th Congress: Unlikely.

The Two-Trillion Dollar Carve-Out: Foreign Manufacturers Of Defective Goods and the Death of H.R. 4678 in the 111th Congress

By ANDREW F. POPPER

I. Introduction¹

On June 16, 2010, I testified in favor of H.R. 4678, The Foreign Manufacturers Legal Accountability Act.² While at first the bill looked like it would sail through, vocal and well-funded opposition from foreign

¹ My great thanks to American University, Washington College of Law students Katie Leesman, Lucia Rich, Jon Stroud, and Allyson Valadez for their invaluable assistance. AFP

² The full text of the legislation as well as my testimony and other witness statements are available at: <http://energycommerce.house.gov/documents/20100616/Popper.Testimony.06.16.2010.pdf> and http://energycommerce.house.gov/index.php?option=com_content&view=article&id=2041:hearing-on-hr-4678-the-foreign-manufacturers-legal-accountability-act-and-hr-5156-the-clean-energy-technology-manufacturing-and-export-assistance-act&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70, last visited November 1, 2010.

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manufacturers and their U.S. representatives placed its future in doubt – and ultimately killed the bill.³

Gross sales of foreign manufactured goods in the U.S. exceed two trillion dollars annually. Conservatively, there are tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets (e.g., Chinese dry-wall, toxic levels of lead paint on toys, contaminated pet food, allegedly lurching cars, infant cribs that to give rise to the prospect of strangulation, etc.). Because of the complex post-Asahi minimum contacts puzzle, many of those producers are not subject to tort liability in state courts regardless of the fact that their products are dangerous and likely to be sold in the United States.

H.R. 4678 would have required foreign manufacturers of certain products and component parts to designate a registered U.S. agent to accept service of process in a state where the manufacturer has a substantial connection either through importation, distribution, or sale of its products. Three federal agencies (the Food and Drug Administration, the Consumer Product Safety Commission, and the Environmental Protection Administration) would have determined the products and

³ The introduction to this article draws from my blog entry on the September 13, 2010 Tortsprof blog website: "Leaping Forward—or Not—With the 2010 Foreign Manufacturer Legal Accountability Act," available at <http://lawprofessors.typepad.com/tortsprof/2010/09/guest-blogger-andy-popper-leaping-forward-or-not-with-the-2010-foreign-manufacturer-legal-accountabi.html>, last visited November 1, 2010.

component parts subject to the terms of the bill as well as the minimum quantity or value required to trigger the terms of the bill. Central to the bill – and central to the fight leading to the bill's demise – was the declaration that designation of a registered agent constituted consent to jurisdiction by the foreign manufacturer in the courts of that state and in federal courts.

This was a simple, elegant, and appropriate step forward. It would have leveled the civil liability landscape, stripping foreign manufacturers of an unfair advantage over domestic manufacturers and addressing a powerful but understandable anomaly in our legal system.

By making possible litigation against those who place into the stream of commerce defective goods, the bill would have triggered the corrective justice incentive mechanisms of the tort system. When you create the realistic possibility for liability, you activate incentives to make safer and more efficient products.

It is both the current state of the law – and problematic – that a foreign producer cannot readily be held accountable in state courts even if (a) the product they design and manufacturer was unquestionably dangerous and defective, (b) the harm to the victim was foreseeable, and (c) the foreign producer has sold large numbers of these products in the U.S. in the past. Every U.S. manufacturer of any product is subject to the U.S. rule of law, the U.S. tort/civil justice system, and U.S. regulatory mandates. That foreign entities and individuals profit from the sale of defective goods and are outside this system is wrong.

We all recognize the legal issue: assertion of jurisdiction over an individual or entity presents a challenge when the entity's contacts with a state are limited. Not surprisingly, many foreign manufacturers do not have an officer, agent, representative, employee, office, or property in a particular state where their products cause harm. At present, such manufacturers cannot readily be "haled" into state court if their contacts fail to meet the constitutionally compelled "minimum contacts" requirement. In addition, the assertion of judicial power must be consistent with notions of fair play and substantial justice, fundamental fairness, and reasonability – for the defendant. In the absence of the ingenious solution presented in H.R. 4678, these norms prevail and access to justice is limited or denied.

II. The Argument for The Foreign Manufacturers Legal Accountability Act

What follows in this section is the argument made before the Energy and Commerce Committee of the House, Subcommittee on Commerce, Trade, and Consumer Protection.

A. A Simple Summary of the Bill

There are three central features in this bill:

1. *Designation of an agent for service of process.* H.R. 4678 requires foreign manufacturers of certain products and component parts⁴ to designate a regis-

⁴ The products or components affected by this bill include drugs, devices, and cosmetics, as defined by § 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321); biological products as defined by § 351(i) of the Public Health Service Act (42 U.S.C. 262(i)); consumer products as defined by § 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052); chemical substances as defined by § 3 of the Toxic Substances Control Act (15 U.S.C. 2602); and pesticides as defined by § 2 of the

tered U.S. agent to accept service of process for civil or regulatory actions. The agent should be located in a state where the manufacturer has a substantial connection either through importation, distribution, or sale of its products. The bill prohibits importation of products or components manufactured by companies who fail to designate a registered agent within 180 days of the regulation.

2. *Delineation of affected products or component parts.* Three federal agencies⁵ will determine those products and component parts subject to the terms of the bill. Each agency will also establish the minimum quantity or value required to trigger the terms of the bill.

3. *Consent to the jurisdiction of state and federal courts.* Establishment of a registered agent in a state constitutes consent to jurisdiction by the foreign manufacturer in the courts of that state and in federal courts.

B. The Nature of the Problem and the Need for Legislation

Foreign manufacturers and distributors of defective goods sold in the United States should be liable for the harm they cause. When sellers place millions of toys in the stream of commerce with toxic levels of lead, children's play-beads containing deadly drugs, and poorly designed cribs that give rise to the prospect of infant strangulation, they must be held accountable.

Freed of the obligations, incentives, and corrective justice effect of the domestic civil justice system – the tort system – to make products safe, foreign manufacturers and distributors have created an intolerable risk to U.S. consumers and placed a grossly unfair burden on domestic distributors and retailers.

Consider this scenario: failing to exercise that reasonable level of care demanded of every U.S. manufacturer, a foreign producer exports to the U.S. a child's toy, pharmaceutical product (e.g., heparin), motorcycle crash helmet, building materials, animal food (for house pets or livestock), or seafood (for human consumption). As a direct and proximate result of using the product, a U.S. consumer suffers an injury or dies. The consumer (or the grieving family) attempts to hold accountable in a U.S. court the foreign producer only to learn that while our legal system would impose liability on any U.S. company under these circumstances, a foreign producer cannot be sued – i.e., cannot be "haled" into court.

It is both the current state of the law – and wholly unacceptable – that a foreign producer cannot readily be held accountable in the above scenario even if (a) the product was unquestionably dangerous and defective, (b) the harm to the victim was foreseeable, and (c) the foreign producer has sold large numbers of these products in the U.S. in the past.

I started writing – and first testified – about this several years ago.⁶ At the time, as I focused on the frustrat-

Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136).

⁵ Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency.

⁶ Popper, "Defective Foreign Products in the United States: Issues and Discussion," 37 *PRODUCT SAFETY AND LIABILITY REPORTER* 45, January, 2009; Popper, "Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods," 36 *PRODUCT SAFETY AND LIABILITY REPORTER* 219 (No. 9, March 3, 2008); Popper, "Holding Foreign Manufacturers Accountable for Defective Products," Before the United States

ing nature of the jurisdictional and constitutional issues, I began to explore the magnitude of the problem. How often did the above scenario take place? What was – and is – the magnitude of the problem?

Here is my conclusion: Conservatively, there are tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets. Well over 80% of the products regulated by the Consumer Product Safety Commission are manufactured abroad – and many of those producers are not subject to tort liability regardless of the fact that their products are dangerous and are likely to be sold in the U.S.

Litigants in Florida allege that Chinese drywall installed in their homes is dangerous, malodorous, and contaminated with high levels of sulfur. There are allegations regarding contaminated toothpaste, seafood, pet food, honey, and claims regarding product integrity deficiencies in steel pipes and automobile tires. While countries outside the U.S. claim they can insure product safety, the record suggests a very different result.⁷

Every U.S. manufacturer of any product is subject to the U.S. rule of law, the U.S. civil justice system, and U.S. regulatory mandates. That foreign entities and individuals profit from the sale of goods – on occasion, dangerous or even deadly defective goods – and are somehow outside this system is offensive, dangerous, and unfair. It is time to put an end to this injustice.

C. Simple, Elegant, Appropriate, and Essential Change

H.R. 4678 provides a remarkably elegant and simple solution to the jurisdictional and constitutional challenges that have thwarted scores of victims in the past. Many foreign manufacturers do not have an officer, agent, representative, employee, office, or property (indicia of more than minimal contact) in a particular state where their products cause harm. At present, such manufacturers cannot readily be haled into court if their contacts fail to meet the constitutionally compelled minimum contacts requirement. Notwithstanding the presence of a citizen injured by an overtly defective product manufactured by a known (but foreign) defendant, U.S. courts have, to date, been unreliable *fora*.

To hale a foreign manufacturer into court, a victim must show that the foreign entity has “purposefully established ‘minimum contacts’ in the forum State.”⁸ In addition, the assertion of judicial power must be consistent with notions of fair play and substantial justice,

House of Representatives, 110th Congress, 1st Session, Committee on the Judiciary, Sub-Committee on Commercial and Administrative Law, November 15, 2007, published at <http://judiciary.house.gov/oversight.aspx?ID=395>.

⁷ After the tainted pet food debacle a few years ago, China, the source of tens of millions of dangerous goods, claimed it would implement 10,000 new safety regulations. As of the date of this testimony, many of those regulations are not in place. *More Legislation to Combat Shoddy Products*, FINANCIAL TIMES, January 9, 2008. http://www.legalinfo.gov.cn/english/News1/content/2009-01/20/content_1024166.htm?node=7604; *Chinese Officials Dealing With New Pesticide Tainted Food Crop*, March 3, 2010, <http://chinadigitaltimes.net/2010/03/chinese-officials-dealing-with-new-pesticide-tainted-food-crop/>; *Melamine Reprise: Who Knew What When?*, <http://chinadigitaltimes.net/2010/01/melamine-reprise-who-knew-what-when/>, January 2010.

⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1984).

fundamental fairness, and reasonability.⁹ This test requires courts to assess the burdens the defendant faces in having to defend a claim in the U.S., including an assessment of whether the defendant “purposefully availed” itself of the rights and obligations of the forum state.¹⁰ Foreseeable presence of a product alone is unlikely to meet these requirements.¹¹

Justice O'Connor's plurality opinion in *Asahi* requires contacts that go beyond the “mere act of placing the product into the stream” of commerce such as advertising, marketing, or designing a product for the forum state.¹² Justice Brennan concurred in *Asahi*, suggesting a more fundamental “stream of commerce” approach – a simple notion involving the foreseeable presence of the product – but his view has not been followed in most state courts. In the void created by *Asahi* and similar cases, courts are – at best – unsure about the most basic exercise of power over foreign manufacturers that produce goods that harm U.S. consumers.

In what has become a rather well-known footnote, Justice O'Connor speculated whether “Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the *aggregate of national contacts*, rather than on the contacts between the defendant and the State in which the federal court sits [emphasis added].”¹³ The footnote simply posed the question and could be seen as an invitation to the Congress to solve the jurisdictional and constitutional question by a legislative declaration that the minimum contacts/reasonability/fairness requirements are met when there is an aggregation of national contacts (though the approach was limited to federal courts). The aggregation of national contacts approach requires definitions of the volume of activity. It is not the basis of H.R. 4678.

H.R. 4678 is in part predicated on a more fundamental notion – choice or party autonomy.¹⁴ If a foreign producer chooses to sell products in the U.S., as a condition of doing business, the producer or its domestic distributor must consent to the jurisdiction of the U.S. courts and designate a registered agent for service of process. Consent to jurisdiction, much like agreements regarding the body of law to apply in a particular contractual transaction, is common, understandable, and

⁹ *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

¹⁰ *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

¹¹ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

¹² *Asahi*, at 111-112.

¹³ *Asahi* at 113.

¹⁴ The “choice” aspect of this bill is not absolute since it is coupled with the notion of meaningful contacts. However, for large producers and distributors, this can be akin to generalized notions of party autonomy. Support for the notion of party autonomy is not a matter of controversy. See, Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 Am. J. Comp. L. 543 (2005); Michael Whincop & Mary Keyes, *Putting the “Private” Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 Melb. U. L. Rev. 515, 542 (1997); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 52 (1992).

effective,¹⁵ a wonderful step forward protecting consumers and leveling the playing field for domestic businesses.

D. A Constitutionally Sound Proposal

Foreign manufacturers are subject to the jurisdiction of domestic courts if there are sufficient minimum contacts with the forum state and if the proceeding comports with our notions of fairness, justice, and reasonability. While *Asahi* requires judges to take into account the unique burdens a defendant faces in a foreign legal system, if a manufacturer reaps the benefits of a distribution network, it should not be able thereafter to deny the forum court's jurisdiction.¹⁶

At their core, these dual requirements (minimum contacts and fairness) involve notice and a relationship with a forum state. Designation of an agent in a state where there are substantial contacts (as mandated by H.R. 4678) meets those requirements.

In the absence of H.R. 4678, the problems with the current state of the law will remain unsolved. Two years ago, I studied dozens of case where jurisdiction was denied even though the products in question were made with the purpose of being sold in the U.S.¹⁷ While there are some cases that find it "fundamentally unfair" to allow a foreign manufacturer to insulate itself from the jurisdiction of the court solely by the use of a distributor, they are not the norm.¹⁸

The minimum contacts puzzle is not complicated. The more a defendant purposefully avails itself of the rights and obligations of the forum state, maintains facilities, bank accounts, owns property, pays taxes, has employees, agents, advertizes, establishes communication with consumers online or otherwise, the less minimum the contact become. All these features infer notice and "relationship" with the forum state – and H.R. 4678 actually requires both.

Constitutional concerns are often framed in terms of two other terms beyond minimum contacts and fairness: service of process and reasonability. On its face, H.R. 4678 provides a statutory solution for service of process. As to reasonability assessments based on the Fifth Amendment and Fourteenth Amendments,¹⁹ one

¹⁵ In the automobile safety area, the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. 30164, requires non-U.S. manufacturers selling vehicles in the United States to designate a permanent resident of the U.S. as an agent for service of process and for purposes of administrative and judicial proceedings that might result if the product turns out to be problematic. A clarification of those rules issued in August, 2005 (FED. REG., August 8, 2005, Vol. 70, No. 151).

¹⁶ This paragraph and much of the materials in this section are drawn heavily from my articles in this publication, Popper, "Defective Foreign Products in the United States: Issues and Discussion," 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, "Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods," 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008).

¹⁷ *Id.*

¹⁸ *Saia v. Scripto-Tokai*, 366 Ill. App. 3d 419; 851 N.E.2d 693 (2006), cert. denied 550 U.S. 934 (2007); *Cunningham v. Subaru of America, Inc.*, 631 F. Supp. 132, 136 (D. Kan. 1986) (finding avoidance of accountability "fundamentally unfair" for certain foreign manufacturers that produce goods designed for sale and sold in the U.S.).

¹⁹ Fifth Amendment (for federal) and Fourteenth Amendment (for state) considerations still apply. The question becomes whether those considerations are addressed in a statute

approach is to look at the policies underlying the statutes, the interests of the state, the ease of litigating a claim, and fundamental fairness. A state's interest in having a producer or distributor of defective goods held accountable, particularly when the producer has an agent in the state and has consented to the jurisdiction of the state, seems a straightforward matter.

Some courts have simplified the reasonability matter and held that once purposeful availment is found, the reasonability requirement is satisfied ("reasonableness . . . is presumed once the court finds purposeful availment. . .").²⁰ Consent to jurisdiction imposed by law and the presence of a registered agent in the state would satisfy the reasonableness analysis. However, without H.R. 4678, the reasonability calculus becomes complex.

Typical of reasonability cases is *Bou-matic v. Ollimac Dairy*²¹ which relied on seven factors to assess reasonability: 1) The extent of purposeful interjection; 2) the burden on the defendant to defend in the chosen forum; 3) conflict with interests of the sovereignty of the defendant's state; 4) the foreign state's interest in the dispute; 5) the most efficient forum for judicial resolution of the dispute; 6) the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum.²² The court also noted that one must look broadly to the connections the manufacturer has with the United States, not just to the forum state.²³ H.R. 4678 would greatly simplify this type of inquiry.

H.R. 4678 can be analogized to various registration statutes.²⁴ While such statutes often facilitate service of process, they have not always resolved in *personam* jurisdiction,²⁵ and have been only part of a fairness/reasonability due process analysis.²⁶ However, a design-

that mandates an agent for service of process and requires consent to jurisdiction.

²⁰ *Bou-matic v. Ollimac Dairy*, U.S. District Court, Eastern District of California, 2006 U.S. Dist. LEXIS 14543, March 15, 2006, citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1990) ("once a court finds purposeful availment, it must presume that jurisdiction would be reasonable"). The *Bou-Matic* court noted that, "[w]hen such a presumption operates, the burden of proving unreasonableness shifts to defendant. . . who must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (citing) *Ballard*, 65 F.3d at 1500 (and quoting *Burger King*, 471 U.S. at 477, supra, note 6)).

²¹ *Id.*

²² *Id.* at 13.

²³ *Id.* at 16.

²⁴ E.g., National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30164; 49 U.S.C. § 10330 (requires every interstate carrier subject to the jurisdiction of the Interstate Commerce Commission to designate an agent for service of process in each state which it operates in); Foreign Corporation Act, Minn.Stat. § 303 et seq.; Tex. Bus.Corp. Act Ann. art. 8.10(A); 10 Del.Code § 3114 (upheld, *Armstrong v. Pomeroy*, 423 A.2d 174 (Del.1980). Cf. various state single-act motorist statutes, e.g. *Hess v. Palowski*, 274 U.S. 352 (1927) (discussing what was then Mass.Stat.1923, c. 431, § 2).

²⁵ See e.g., *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491, 494 (5th Cir. 1989) (service was proper but did not resolve personal jurisdiction.) but cf. *Burnham v. Superior Court*, 495 U.S. 604 (1990) (personal service of process over an individual is sufficient for personal jurisdiction).

²⁶ See, Sean K. Hornbeck, *Comment, Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 AL-

nated agent plus a legislative declaration of consent to jurisdiction provides a solid basis for declaring satisfied the reasonability requirement, even when characterized as simple registration.²⁷ An entity that consents to jurisdiction gives up the right to challenge it, even if compelled to consent²⁸ by statute.²⁹

E. Consistent With Globalization, Legal Systems of U.S. Trading Partners

In *Jones & Pointe v. Boto*,³⁰ a foreign manufacturer sold artificial Christmas trees in Virginia, derived profits from those sales, and maintained a website that invited inquiries regarding the products in question.³¹ This information was available to any person and the design of the website inferred no limitations on the areas where the site was to be accessed or the products sold. Accordingly, the court held that "in this age of WTO and GATT [the General Agreement on Tariffs and Trade] one can expect further globalization of commerce, and it is only reasonable that companies that distribute allegedly defective products through regional distributors in this country... anticipate being haled into court by plaintiffs in their home states [emphasis added]."³² H.R. 4678 resolves the question of "home

B.L.Rev. 1389, 1433-1436 (1996). ("Unless otherwise indicated, courts will read statutes containing such service provisions as including an authorization for a national contacts test.") and ("The Ninth Circuit construed 'worldwide' or national service of process provisions as legislatively authorizing both service abroad and the use of a national contacts tests for purposes of asserting personal jurisdiction over foreign defendants.") (internal citations omitted). (citing *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989) (upheld a statute authorizing international service of process using a "national contacts" approach); Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 21, FN (2006) (discussion of personal jurisdiction issues).

²⁷ There is some disagreement about the effect on *in personam* of simple registration statutes. Compare *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) ("One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.") and *Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135, 136 (6th Cir. 1946) ("Service upon an agent so designated in conformity with a valid state statute constitutes consent to be sued... The fact that the consent was given under a valid federal statute rather than under a state statute does not detract from the force and legal effect of that consent."), with *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) ("the mere act of registering an agent [...] does not act as consent" and fact that Learjet sold 1% of national business in Texas not enough to establish general jurisdiction) and *Ratliff v. Cooper Laboratories, Inc.* 444 F.2d 745 (4th Cir. 1971), cert. denied 404 U.S. 948 (1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

²⁸ See *Knowlton supra* note 25 at 1200 ("The designation of an agent, in accordance with federal law, also operates as consent to the personal jurisdiction of the Minnesota courts.")

²⁹ See *Knowlton supra* note 25, at 1199-1200 ("Such consent is a valid basis of personal jurisdiction, and resort to minimum contacts or due-process analysis to justify the jurisdiction is unnecessary.") (quoting *Ins. Co. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)).

³⁰ 498 F. Supp. 2d 822, 829 (E.D. Pa. 2007).

³¹ *Id.* at 829.

³² *Id.* at 831 (citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994)).

state" and is fully consistent with evolving trends and expectations in our increasingly globalized economy.³³

In terms of the WTO,³⁴ H.R. 4678 does not create an undue barrier or obstacle to trade. It imposes on foreign manufacturers the same responsibilities and obligations of domestic sellers and producers. The WTO concept of trade without discrimination requires a somewhat level playing field for domestic and non-domestic market participants and H.R. 4678 does just that.

Moreover, while I do not teach in the international trade area, it appears that many of the primary U.S. trading partners (including China and most of Latin America) do not give U.S. companies doing business in their countries a "free pass" from their legal systems.³⁵ It is only logical, therefore, that foreign companies within the U.S. are likewise subject to the jurisdiction of U.S. courts.

More than a century ago, the Supreme Court recognized that the U.S. legal system did not operate in isolation.³⁶ As the 19th Century drew to a close, an international vision of commerce emerged. Part of that vision, however, was the understanding that there are rules to follow both in terms of international law and the country-by-country application of domestic law predicated, *inter alia*, on protecting the "rights of [a country's] own citizens or of other persons who are under the protection of its laws."³⁷ H.R. achieves precisely that objective: without creating any unusual burdens, it gives U.S. consumers access to the civil justice system.

The short of it is that H.R. 4678 aligns the U.S. with our trading partners. It does not create unique or extraordinary trade barriers. Moreover, the general rule in tort law in almost every country regarding forum is *lex loci delicti* - the law of the place of the wrong. H.R. 4678 is fully consistent with this construct.

H.R. 4678 is important not only in terms of injured consumers but in terms of U.S. business interests.

³³ I discuss some of the special challenges plaintiffs face when trying to pursue claims against a foreign defendant in my article in the *Product Safety and Liability Reporter* (*supra*, note 3). For this testimony, I will only note that Central Authority established by the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters is the likely means of serving process on a foreign defendant (there are other mechanisms, e.g., letters rogatory, that are unreliable at best). Time, costs, and inconvenience plague this process. The ability to secure service of process through a domestic designated agent set forth in H.R. 4678 should ease some of the burden on injured U.S. consumers.

³⁴ For general information about the World Trade Organization, see, www.wto.org

³⁵ Yu Shanshan, *Psst. China Has Tort Laws. Oh, And They Are Relevant For Foreigners*, April 1, 2010, <http://www.beijingtoday.com.cn/tag/tort-law> (on the application of China's New Tort law); Peter Neumann and Calvin Ding, *China's New Tort Law: Dawn of the Product Liability Era*, <http://chinabusinessreview.net/public/1003/neumann.html>, June 2010; John F. Molloy, *Conference Report, Miami Conference Summary of Presentations*, 20 ARIZ. J. INT'L & COMP. LAW 47, 59-63 (2003) (describing the strategic and practical considerations relevant to U.S. companies sued in Latin America countries).

³⁶ *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁷ "But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 164.

When foreign entities (through their products) are in the U.S. and are outside the reach of the U.S. court system, a market distortion occurs. Quite simply, foreign entities (and their domestic distributors) are at a distinct cost advantage over their domestic competitors who must both avoid liability by exercising higher levels of care and must insure against the chance of product failure.

In other areas of law (e.g., antitrust³⁸), entities located abroad that affect and cause harm to interests within the U.S. bear responsibility for those consequences in U.S. courts. Entities doing business here – selling goods directly to consumers – should also be no less accountable in our courts.

H.R. 4678 levels the playing field and protects consumers. It is constitutionally sound and consistent with trade law. It is a straightforward and essential change, giving injured persons access to the civil justice system.

This is good legislation that will produce fair and just results. I ask respectfully that you adopt H.R. 4678.

III. Questions From the House

After the above testimony was given before the Energy and Commerce Committee of the House, Subcommittee on Commerce, Trade, and Consumer Protection, I received a series of questions about the testimony. Some of those questions and my answers follow:

1. Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?

Since you requested a yes/no response, the answer is “yes.” Obviously, there are great variations in foreign legal systems and a one-word answer does not encourage a discussion of those factors.

As noted in several answers below, principles of comity are of consequence in all foreign affairs – especially trade – and outright rejection of all non-U.S. legal systems (or a “no” response to your question) by all companies doing business abroad does not seem a wise approach – nor a safe generalization.

In a number of countries where U.S. products are sold, U.S. companies are already subject to the domestic legal system of the place the injury occurs. In that sense, H.R. 4678 would close a loophole in the U.S. legal system by creating accountability obligations consistent with those that exist abroad.

For example, consider the new Chinese tort law which is modeled, in part, on the law of several U.S. states. Articles 43, 45, and 47 establish both punitive damages and strict liability which, commentators report, will have “significant ramifications for companies doing business in China. . . .”³⁹ U.S. firms are already advising their clients about this reality.⁴⁰

³⁸ See generally, Article 5(3) of the Brussels I Regulation applicable to EU countries. See, Boast and Pennington, *Extraterritorial Application of U.S. Antitrust Law: An Overview*, <http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/boast.pdf>; Roger Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 Va. J. Int'l L. 213 (1993).

³⁹ Roy Zou and Xi Liao, *China Enacts Systematical Tort Law*, <http://www.lexology.com/library/detail.aspx?g=4f49b26b-c799-461b-b1ce-e15223cfe53>; Psst. China Has Tort Laws. Oh, And They Are Relevant For Foreigners, China Law Blog – China Law For Businesses http://www.chinalawblog.com/2010/03/psst_china_has_tort_laws_oh_an.html.

European countries following Article 5(3) of the Brussels I apply tort law constructs to U.S. companies.

In Japan (pursuant to Article 15(I) of the Code of Civil Procedure), there is an in-country jurisdictional base for persons injured by products manufactured abroad.

Thus, H.R. 4678 is in-step with our major trading partners and does not impose legal obligations on foreign manufacturers any more than (a) are imposed on domestic sellers, and (b) any more than are imposed on U.S. companies doing business abroad.

2. It is my understanding that there is currently no method to enforce U.S. judgments abroad other than “good will.” Keeping that in mind, how much accountability do you believe this bill will assign to foreign manufacturers considering that it cannot be enforced?

I do not agree with the premise of the question; there is more to enforcement than a “good will hope” of compliance. Thus, I believe that H.R. 4678 will generate a meaningful measure of accountability – which strikes me as the main reason foreign manufacturers are fighting this legislation.

Moreover, it makes perfect sense that this bill is not focused on enforcement of judgments against foreign manufacturers – the first step is to get them into court. Thus far, foreign manufacturers have evaded the U.S. legal system. It's time to put that to a stop.

After this bill becomes law, a number of things are likely to happen, all of which benefit U.S. residents.

First, foreign companies will have to give thought to making their products safer – which is, in the end, the driving force behind the tort system. The current system gives foreign manufacturers a free pass – and the results speak for themselves: freed of any obligations

www.chinalawblog.com/2010/03/psst_china_has_tort_laws_oh_an.html.

⁴⁰ China Introduces Tough New Tort Laws. “China’s new Tort Liability Law, another step in the Chinese government’s strategy for dealing with China’s legacy of environmental damage, represents a shift toward a tougher Western-style tort system. . . . [T]he law goes into effect July 1.” http://www.willis.com/documents/publications/Services/International/2010/Intl_Alert_China_New_Tort_Law.pdf; Kaichen Xu, *China Adopts Environmental Tort Law*, “The Tort Liability Law is a new development in China’s environmental laws and will have significant ramification on companies doing business in China. . . . How Chinese courts will interpret and enforce the Tort Liability Law remains to be seen. . . .” <http://www.omm.com/newsroom/publication.aspx?pub=921> (emphasis added); *China Passes Tort Law: A Brave New World of Punitive Damages?* “[T]he stated purpose of the law is “protecting the lawful rights and interests of civil law parties, explicitly defining tort liability, preventing and punishing torts, and promoting social harmony and stability.” <http://www.gtllaw.com/NewsEvents/Publications/Alerts?find=132305>.

For the Paul Weiss advisory, see, “New Tort Law in China,” <http://www.paulweiss.com/files/Publication/092ddc34-ale8-4d59-9a8b-db68bed8f433/Presentation/PublicationAttachment/10944494-5b87-4230-98bc-dd1d9052b110/PW-ALB10-5.pdf>.

For the Taylor Wessing advisory (which has an elaborate discussion of the law and encourages foreign companies doing business in China to secure in-country product liability insurance), see, Ingo Vinck & Yimin Chen, *Milestones: China’s New Law on Tort Liability*. <http://www.taylorwessing.com/newsletter/china/archive/china-alter-april-2010/milestones-chinas-new-law-on-tort-liability.html>.

under our system of civil liability, there has been a consistent and dangerous flow of unsafe foreign products.

Second, injured U.S. consumers or businesses who seek to hold accountable a foreign manufacturer will not have to waste time and resources serving process through the Hague Convention. The potential for reasonable access to court at a reasonable cost has a great incentive value in terms of the quality of goods and services.

Third, as jurisdiction is secured and judgments are entered under the terms of this bill, the premise of this question will be tested. Enforcement of judgments may require cooperation with foreign legal systems – but I would not assume such cooperation will be denied.

Well-established principles of comity essential to the entire diplomatic process actually suggest the opposite result. Moreover, large entities doing business in the U.S. often have assets in the U.S. – and those assets can be seized to enforce an unpaid judgment. This is a powerful incentive to comply with the terms of a judgment.

Finally, one interpretation of this question presupposes that if a judgment is unfulfilled, it has no value. That is a false assumption. A judgment is a public record and can have powerful consequences for the foreign provider. Market perception and market value are sensitive; a finding against a manufacturer and entry of a judgment affects public perception of the value and safety of a product. This is a powerful tool in creating incentives for safer, more efficient, and more reliable products.

3. You testified that there are “tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets.” If true that is an alarming figure. What time scale is that production figure over, and what studies are you referencing?

I began research on the question of the range and nature of the problem of defective goods in 2008. I referenced in my testimony my article in the *Product Safety and Liability Reporter* from 2009 which lists some of the defective products. If anything, “tens of millions” is an understatement. *Forbes Magazine*, not exactly a forum for the consumer voice – and not given to hyperbole – has called the number of defective products colossal.

President George W. Bush’s Interagency Working Group on Import Safety, established in 2007, reported there are \$2 trillion worth of products imported into the U.S. and that there is a need to raise safety standards for foreign products and for establishing identification and enforcement mechanisms for foreign products.

The number of foreign manufactured defective products sold in the U.S. is, I suppose, subject to debate. However, the notion that it is less than “tens of millions” simply is not true. It is more – far more.⁴¹

⁴¹ To give a sense of the magnitude of the problem, I have listed below a very small number of online pieces from detailing certain defective goods, some of which come from a CPSC recall of products from mainland China issued July 9, 2010

a. <http://www.hktdc.com/info/vp/a/ctde/en/1/2/1/1X06ZQ60/China-Trade/CPSC-Recalls-Various-Products-Made-in-Mainland-China.htm> (8,400 baby walkers)

b. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10269.html> “2.2 million cribs to address drop-side hazards and other hazards that affect the safety of young children.”

4. As I understand it, this legislation subjects foreign companies to the jurisdiction of U.S. courts, but lacks any associated enforcement power. Given that it doesn’t increase liability for the assets of any foreign company, won’t plaintiffs still go after U.S. companies. i.e. those with the accessible deep pockets?

This question is answered in part in my response to Question 2.

Currently, product liability cases can and do result in liability of domestic companies – if the bill becomes law, that liability would either be transferred to or shared with foreign manufacturers and not borne solely by the U.S. company.

The question presumes that no foreign company will respect the jurisdiction of U.S. courts and that every foreign country will refuse to assist in the implementation of U.S. law. I do not believe that is a correct assumption. At the most basic level, U.S. assets of a foreign company doing business in the U.S. would be subject to seizure to satisfy a judgment.

Even if enforcement of judgments becomes an issue, I believe that the passage of this bill will force foreign entities to give thought to making their products safer –

c. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10273.html> 747,000 drop-side cribs and an indeterminate number of fixed and drop-side cribs using wooden stabilizer bars

d. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10274.html> 750,000 Jenny Lind cribs made in mainland China and Mexico

e. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10275.html> (103,000 drop-side cribs)

f. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10276.html> (306,000 Bonavita, Babi Italia and ISSI drop-side cribs)

g. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10277.html> (156,000 drop-side cribs) <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10278.html> (50,000 drop-side cribs)

h. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10279.html> (7,300 children’s tiaras because they contain high lead levels)

i. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10281.html> (4,700 Super Lighting Rockets because they are overloaded with pyrotechnic composition)

j. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10283.html> (20,000 power adapters for heated pet beds because they can cause arcing between the coil spring and the metal connector)

k. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10284.html> (233,000 Sony VAIO notebook computers because they ... pose a burn hazard)

l. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10287.html> (66,200 charm bracelets and 2,200 rings because the metal substrate in this jewelry contains high levels of cadmium)

m. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10288.html> (500 Powertec drill presses ... posing a risk of electrical shock)

n. <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10115.html> About 1.5 million [products] ... Manufactured in: China ... [including] Graco Recalls Strollers due to fingertip amputation and laceration hazards;

Here is some additional online information on the volume of defective goods flowing into the U.S.:

<http://www.reuters.com/article/idUSSP36172920080917> (900,000 Simplicity Cribs - risk of infant strangulation)

<http://www.reuters.com/article/idUSWEN191320071025> (On toxic levels of lead in paint)

<http://www.manufacturing.net/News-Defective-Chinese-Drywall-Hits-Homeowners-Insurance-101509.aspx> (On massive quantities of dangerous and defective drywall).

which is (as mentioned earlier) the driving force behind the tort system.

Finally, as noted in response 2, a judgment is a public record and can have powerful consequences for the foreign provider. Market perception and market value are sensitive; a finding against a manufacturer and entry of a judgment affects public perception of the value and safety of a product. This is powerful tool in creating incentives for safer, more efficient, and more reliable products – and will relieve pressure on U.S. manufacturers.

5. How can U.S. judgments against foreign companies be enforced if this bill passes?

See responses to questions 2 and 4. In addition to the potent force of seizing domestic assets of foreign companies, the profound impact of a judgment on the market value or reputation of a product, and the well-established principles of comity that suggest that judgments will be enforced, there are other factors to consider. Once a judgment is entered, the whole of the U.S. legal system is on notice – and that includes regulation of imports. An unsatisfied judgment – coupled with a finding of defect – may well trigger restrictions that would limit or prohibit the import of a presumptively unsafe product.

In dealing with the very real problem of unsafe foreign goods coming into the U.S., President Bush's 2007 Interagency Working Group on Import Safety recommended the increased use of electronic track and trace technologies to identify the product source and points of distribution. (Report to the President, page 39). Couple notices of defects with notices of unpaid judgments and the incentive on foreign manufacturers increases to become accountable and to avoid selling dangerous products (again, a primary feature of the tort system).

If there is an enforcement mechanism, does it worry you how similar provisions passed by foreign countries might affect U.S. importers?

That does not seem a dominant consideration. U.S. companies are already subject to foreign laws in a number of countries (see answer to question 1).

I do not see U.S. importers affected meaningfully by this bill – but I do see U.S. consumers finally having their day in court. The capacity to hold accountable the seller of a defective and dangerous product is the real consequence of this bill – not the conjectural impact on U.S. companies selling goods abroad.

6. Industry has informed us that U.S. importers will likely have to shoulder the compliance burden for establishing registered agents on behalf of their foreign counterparts. Keeping that in mind, wouldn't this bill hurt U.S. importers, instead of leveling the playing field as you stated in your testimony? Additionally, if foreign countries reciprocate, won't that place an additional compliance cost on U.S. exporters?

As to the first question, "no." This has been answered in 2, 4, and 5. As to the second question involving reciprocity or retaliation, please see answers to 1, 2, 4, and 5. In addition, domestic importers will be able to require foreign manufacturers to designate a foreign agent in the United States. The U.S. companies will be relieved of liability – not have it increased.

7. In your testimony you illustrated a scenario where a foreign producer cannot be sued or "hailed" into court. My understanding is that once service of process requirements are met a court is authorized to move forward with a suit. It is also my understanding that the Hague convention on Service of Process, and failing that, Letters Rogatory can be used to serve process to generally all our major trading partners. Considering this, how prevalent currently is the scenario you described?

I would characterize the scenario from my testimony as common and troubling. The problems with the Hague Convention and Letters Rogatory include inefficiency, time-consumption, and expense. Designation of a U.S. agent is a simple and a regular part of doing business for all domestic companies. Today, foreign companies often use the Hague rules as a delaying strategy, even where they have sufficient presence here and could have been served with process.

H.R. 4678 allows consumers and businesses to bypass these obstacles. Requiring foreign entities to register their appropriate corporate identities together with the products shipped to this country and to consent to jurisdiction in the U.S. would give injured consumers their right to their day in court and would short circuit complexity and inefficiency in the Hague model.

8. Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?

The legislation requires federal agency findings of volume and product designation. That is the process that will be used to determine which products or finished, processed, and/or assembled component parts are within the reach of the bill, should it become law. Component part liability is a regular and important part of tort law in the U.S. – there are instances where the component part provider is found liable and those where the entity assembling the product bears full responsibility and the component part provider is indemnified. It is safe to assume that body of law will be used (in conjunction with agency designation) to determine "[h]ow far down the supply chain this requirement would stretch."

a. Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?

No. I do not think that is the purpose of the bill (assuming "raw product" means unfinished, unprocessed, and unassembled and not a final product intended for sale "as is" to a user/consumer in the U.S.)

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

I do not believe there would be a discernible effect on U.S. companies engaged in import and export other than relieving U.S. domestic sellers of responsibility properly borne by their foreign suppliers.

The registered agent requirement is designed to hold foreign manufacturers accountable for the products they sell in this extremely lucrative market without hav-

ing an array of expensive and unnecessary procedural defenses which complicate, limit, and in some instances block the protection of American consumers. The likelihood that many foreign manufacturers would forego sales in a \$2 trillion market because of the need to have a registered agent seems remote.

9. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

The substantive law would be applied to foreign manufacturers on the same basis it is applied to American manufacturers. The difference would be that this legislation would make the foreign firms more identifiable and more accessible to jurisdiction in American courts. It would merely deprive them of costly and protracted procedural defenses without depriving them of any defenses that are available to domestic manufacturers under American law.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

See answers to 2, 4, and 5.

c. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

In my article in the *Product Safety and Liability Reporter*, I detailed dozens of cases where foreign entities were able to resist the jurisdiction of U.S. courts – and that is a small sample.

Large foreign companies that sell products in the U.S. avoid legal proceedings regularly. I looked through many, many reports and articles on Chinese companies selling defective goods in the U.S. and I think it is safe to say that this is not a debatable point.

Those companies that are the subject of lawsuits today delay the process and force U.S. consumers and businesses to go through substantial procedural bureaucracy – requiring translation of papers and a foreign government to serve process – before they will admit that process has been served, often with no consequences for the harm they caused.

The bill changes that inequity. It does not prohibit sales – it makes sellers accountable and creates incentives for limiting and eliminating the great range and nature of dangerous or defective products currently in the stream of commerce.

10. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

This legislation is targeted at any company that benefits from the lucrative U.S. market and is (today) able to delay and avoid litigation and accountability. If the companies have a substantial in-state U.S. presence, they are already subject to the jurisdiction of the courts. The problem (noted in my testimony and in my *Product Safety and Liability Reporter* article) is that the “minimum contacts” requirement is difficult to meet – and is not satisfied by high profits, significant impact, or even the uncontested assertion that the product was intended for sale in the U.S.

a. The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a U.S. judgment if they want to continue business in this country?

Yes. See answers to questions 2-5.

b. If that is the case do you need to require an agent for service of process?

Absolutely. As noted in my testimony and my article, the problem of securing *in personam* jurisdiction over foreign companies is widespread. It frustrates just and fair results, limits accountability, and denies persons in the U.S. access to the courts. In the absence of an agent, these problems will continue.

Moreover, this bill does more than require designation of an agent – it gives clear and understandable notice to all that doing business in the U.S. means being subject to U.S. law. This is required of every domestic company – and it should be required of every foreign entity doing business here as well. Consent to jurisdiction (mandated in the bill) is not an undue advantage – it is the law for every U.S. business.

The potential to serve a foreign company that benefits from U.S. sales and from the U.S. legal system at many levels (in terms of banking, currency, credit, etc.) and the U.S. infrastructure (broadly defined) is fair, just and reasonable. Injured consumers should not be tormented by our legal system – they should be served by it. An agent in the U.S. makes that possible. U.S. consumers injured in their home states by products on which they rely justifiably should not be met with massive expenses and no reasonable assurance that the wrongs they sustained will be redressed.

This bill is a chance to give consumers and businesses the basic and straightforward opportunity to resolve peacefully disputes in a court of law and to secure remedies where they have been wronged. Designation of an agent is a remarkably simple, elegant, and wise step forward.

IV. The Last Days of H.R. 4678

After the hearings and a mark-up in late July 2010 that failed to produce consensus, there was a dialogue between various witnesses and others with an interest in the bill. By late July, there was a rather sensational proposition on the table: the bill might be acceptable to foreign manufacturers if (brace yourself) there was a carve-out for foreign manufacturers (at least for those who had domestic subsidiaries).

The proposal was taken seriously. After all, given the less-than-stellar record of the 111th Congress on almost everything except health care and finance reform, some legislation was better than none. In addition, there was something to be said for having domestic sellers (e.g., Toyota of America) take responsibility for the allegedly dangerous design choices made by their corporate parents.

Unfortunately, the terms of this carve-out were not exactly what one would have hoped. What was offered by the domestic subsidiaries of the foreign manufacturers was not taking genuine legal responsibility (or accountability, as the bill's title suggests). Instead, the offer was to make sure that if a judgment was rendered against a foreign company, the domestic subsidiary would make sure the judgment, once final, was paid.

To be blunt, this failed to address a single problem that gave rise to this legislative initiative since it presup-

posed that an injured plaintiff could secure *in personam* jurisdiction over a foreign entity. The whole point of the bill was to address the difficulty of securing personal jurisdiction – and this offer conceded nothing of the sort. The proposal did not address service of process or discovery but was limited to responsibility for civil judgments, which of course assumes one could get a judgment, over a foreign manufacturer with a domestic subsidiary.

V. Conclusion

After millions of cars were recalled in January and February of 2010, Akio Toyoda, President of Toyota of Japan appeared before the Committee on Oversight and Government Reform to inform the Congress that he was “very sorry” his company had failed to address significant design failures that placed American consumers in danger. His apology was effusive – but did not include a pledge that Toyota would be accountable.⁴² A month later, representatives from Toyota of America advised that that incidents may well have been the fault of the drivers (a common tort reform refrain) who were guilty of “pedal misapplication.”⁴³

As far as I know, there was never an offer to be accountable for claims pertaining to design, manufacture, assembly, warnings, labels, inspection, or packaging; never an offer to have domestic sellers legally responsible for injuries and damages; never an offer to provide information, documents, or witnesses; never an offer to consent to the jurisdiction of U.S. courts; never an offer to do something as simple as designate an agent for service of process.

⁴² Toyota's President Apologizes for Massive Global Recalls, February 6, 2010, at: [Februaryhttp://www.japantoday.com/category/business/view/toyotas-president-apologizes-for-massive-global-recalls](http://www.japantoday.com/category/business/view/toyotas-president-apologizes-for-massive-global-recalls).

⁴³ Hiroko Tabuchi, Gas-and-Brake Pedal Gets New Look After Recalls, August 3, 2010. <http://www.nytimes.com/2010/08/04/business/global/04pedal.html>.

The actions of Toyota of Japan are fully consistent with the resistance to H.R. 4678. All too many foreign manufacturers selling products in the United States have secured the rich financial benefits of the U.S. marketplace without being subject to U.S. tort law. A simple and wise legislative initiative could have changed that, leveled the playing field for U.S. businesses subject to tort law, and in so doing, protected U.S. consumers. Unfortunately, politics and self-interest stood in the way.

Perhaps something resembling H.R. 4678 will resurface as the 112th Congress in 2011. After watching H.R. 4678 come to an undeserved and costly demise, I think it unlikely. For those seeking to hold accountable foreign manufacturers, I suggest brushing up on the stunningly complex and expensive Hague Convention process to secure jurisdiction over foreign entities.⁴⁴ It may be your only recourse.

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⁴⁴ Hague Service Convention, T.I.A.S. No. 6638, 20 U.S.T. 361 (1965); Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (on evidence); 28 U.S.C.A. § 1781 (1994 & Supp. 2005) (on evidence); 20 U.S.T. 361, T.I.A.S. No. 6688, available at 28 U.S.C.A. Fed. R. Civ. P. 4 (West Supp. 1985); *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 486 U.S. 694 (1988); Erica M. Davila, “International E-Discovery: Navigating the Maze,” 8 PGH. J. Tech. L. & Pol’y 5 (2008).